Nos. 12,698-99

IN THE

United States Court of Appeals

For the Ninth Circuit

BANK OF CHINA, a Corporation, *Appellant*, vs. WELLS FARGO BANK & UNION TRUST CO., a Banking Corporation, *Appellee.*	No. 12698
BANK OF CHINA, a Corporation, *Appellant*, vs. WELLS FARGO BANK & UNION TRUST CO., a Banking Corporation, *Appellee.*	No. 12699

Appellant's Opening Brief

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Cases

STATUTES AND REGULATIONS

TREATISES

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INTRODUCTION

These are appeals from two similar decisions of the District Court in companion cases denying a depositor access to its demand deposits in the defendant bank and discharging that bank from all liability to its depositor. The Bank of China, appellant, is the international exchange bank of the National Government of the Republic of China, the government of China recognized by the United States. It deposited more than $800,000.00 with appellee, Wells Fargo Bank & Union Trust Co. Appellant, driven from the mainland of China by the Communist armies and now conducting its banking operations from its head office in Formosa, demanded return of its funds. The appellee bank refused to pay because representatives of the Com-

munist Peoples Government of China, relying upon their seizure of the assets of the Bank of China on the China mainland, claimed that they had become the legal representatives of the Bank of China. Attorneys for the Communists appeared in the court below and moved to dismiss these actions on the ground that the appellant Bank of China, operating from Formosa, was not entitled to maintain them.

The District Court denied the motions to dismiss. It also denied appellant's motion for summary judgment. More than that, it directed that the funds of appellant be deposited with the Clerk of Court to remain there indefinitely; it ordered that the appellee bank be finally discharged of all liability to appellant both for principal and interest; and it enjoined appellant from attempting to enforce in any fashion its rights against appellee. The District Court held in effect that, since the Bank of China had lost certain of its assets in China by seizure and conquest, it was also to be deprived of its San Francisco assets. The decision is contrary to the public policy of the United States and it is in conflict with the settled rule that acts of seizure or expropriation by an unrecognized foreign government create no claim to assets located in the United States.

JURISDICTION

The jurisdiction of the District Court was based upon diversity of citizenship (28 U.S.C. 1332). Plaintiff-appellant, Bank of China, is a corporation organized under the laws of the National Government of the Republic of China. Defendant-appellee, Wells Fargo Bank & Union Trust Co., is a California corporation (R. No. 12698, p. 3; No.

12699, p. 3). There are no other parties. The amount in controversy in each case exceeds $3,000 exclusive of interest and costs (R. No. 12698, pp. 4, 6; No. 12699, pp. 4, 15).

This Court has jurisdiction of this appeal pursuant to 28 U.S.C. 1291, 1292 and 1294(1). The orders of the court below, amounting to final decisions and injunctions in both cases, were entered August 7, 1950 (R. No. 12698, p. 106; No. 12699, p. 26). Notices of appeal were filed August 28, 1950 (R. No. 12698, p. 111; No. 12699, p. 31). Motions to dismiss the appeals were denied by this Court on October 17, 1950.

By stipulation the decision of the District Court in case No. 12699 was made upon the record and decision in case No. 12698. By order of this Court the cases are consolidated for briefing and argument.

STATEMENT OF THE CASE

The Bank of China, created in 1912 (R. 187, 303)[1], was reorganized in 1928 under special charter of the National Government of the Republic of China as an international exchange bank (R. 187, 303). Under the new charter and subsequent to 1935 the National Government held half of the stock of the bank (R. 164, 303), and named nine of its twenty-one directors (R. 307). During the war with Japan, the National Government made further capital contributions to the bank (R. 287) and by decree so revised its status that the Government held two-thirds of the stock (R. 90, 287-8) and named thirteen of twenty-five directors (R. 90, 287-8). The balance of the stock was privately held

[1]Unless otherwise noted, all references are to the record in No. 12698.

and the remaining directors were named by the private stockholders (R. 287-8, 90, 169). Under its charter the Bank has both public and private functions. The Bank is responsible for handling National Government funds deposited abroad (R. 305), for issuing National Government bonds in foreign markets (R. 305), for promotion of trade (R. 305), for handling a portion of the Treasury funds of the National Government (R. 305), and for certain commercial functions (R. 306).

The present directors of the Bank were elected at a stockholders meeting in 1948 (R. 92, 169-70) for a term of four years (R. 307). Twenty-one of the twenty-five directors are in Formosa, Hong Kong or the United States (R. 183). Two of the twenty-five are residing in areas subject to Communist control (R. 183). The whereabouts of the other two are unknown (R. 183). The managing directors of the bank, a group of seven (including the Chairman of the Board) selected from the board of twenty-five (R. 307), are all in Formosa, Hong Kong or New York (R. 183). These constitute the executive committee which operates the Bank (R. 234). The general manager of the Bank, Mr. Hsi Te-Mou, certified as such by the National Government (R. 300), who is now in New York and actively engaged in conducting the affairs of the Bank (R. 283), and the manager of the New York agency, Mr. Tuh-Yueh Lee, who possesses broad powers over the Bank's affairs in this country (R. 37, 230-1, 241), authorized the institution of these actions (R. 263-4).

Prior to the Communist conquest the Bank had its head office in Shanghai (R. 304) with numerous Chinese and foreign branches (R. 273, 304) including a New York agency (R. 245, 265) operating under the supervision of

the New York State Banking Department (R. 265, 301-2). The advance of the Communist armies forced the Bank to transfer its headquarters from Shanghai. The Bank directors in cooperation with the National Government which held two-thirds of the stock of the Bank and hence had full power to direct its destiny (R. 194, 287-8) moved the Bank in advance of the Communist forces from Shanghai to Canton (R. 195, 298), from Canton to Chungking (R. 36, 298) and finally from Chungking to Formosa (R. 298). From headquarters there the Bank continues to conduct its affairs as a corporation certified to be in good standing by the National Government (R. 298). After the Bank left Shanghai, new ciphers, test keys and signatures were authorized (R. 225-6, 247-9) and correspondents of the Bank, including Wells Fargo were notified accordingly (R. 247-9, 255, 271-2).

In June, 1949, the Bank of China had been doing business with Wells Fargo for many years (R. 131, 115, 149). The Bank then had on deposit with Wells Fargo in San Francisco more than $800,000. The accounts bore various branch bank designations, "Bank of China, Shanghai," "Bank of China, Hong Kong," "Bank of China, New York," "Bank of China, Tientsin," and "Bank of China, Tsingtao" (R. 7; R. No. 12699, p. 15), but the funds belonged in each case to the single corporate entity "Bank of China" (R. 57-8, 90, 192, 273). On June 27, 1949, Wells Fargo received a cable from Communist Shanghai reading:

> "Following the liberation of Shanghai this bank was taken over by the Shanghai Military Control Commission by order of the Chinese Peoples Liberation Army East China Command on May Twenty-eighth and the powers vested in its original board of

directors are now temporarily vested in the East China Financial and Economic Affairs Administration Stop Those officers who escaped to Hong Kong and elsewhere have been dismissed and can no longer represent this bank Stop Their specimen signatures and testkey established between you and them should be considered null and void Stop All communications from them are unauthorized Stop You are requested not to make payment except by our specific order" (R. 134).

A similar cable was received June 30, 1949 (R. 68, 138), and on July 22, 1949, the Communists purported to notify Wells Fargo by cable that "by order of Chinese Peoples Liberation Army East China Command" a new general manager and assistant general manager had been appointed for the "Bank of China" (R. 68, 140).

On October 7, 1949, Wells Fargo received instructions from the head office, foreign department, of the Bank of China then located in Hong Kong to transfer $600,000 to the New York agency of the Bank (R. 261). Wells Fargo refused to make the transfer, setting up the possible conflicting Communist claim (R. 261). Thereafter, payment of the entire deposit which had been made from its Shanghai office and then amounting to $626,860.07 was demanded by the Bank of China and refused by Wells Fargo (R. 4, 6). Appellant later demanded payment of additional deposits originating from its Hong Kong, New York, Tientsin, and Tsingtao offices and totaling $174,-224.57,[2] which was likewise refused (R. No. 12699, pp. 4,

[2]This debt was later reduced to $171,724.57 through payment (allegedly by inadvertence) of a draft for $2,500.00, drawn against Wells Fargo by appellant (R. No. 12699, pp. 15, 24).

15-16). The refusal of Wells Fargo to pay was caused by the Communist claims (R. 116-17, 144, 150, 330-1).

These actions were filed by the Bank of China to enforce its demands and recover its funds. Appellant moved for summary judgment (R. 11). The ruling on the motion was reserved and the action was set for immediate trial (R. 335). Thereupon, Robert W. Kenny, Esq., Martin Popper, Esq., Benjamin Dreyfus, Esq., and Francis J. McTernan, Jr., Esq., acting at the instance of Frederick Vanderbilt Field and purporting to represent the Bank of China and relying upon cable instructions received by them from Communist representatives in Peking (R. 80, 89-94), filed a motion in case No. 12698 to dismiss the complaint or, in the alternative, to substitute themselves as attorneys for the plaintiff (R. 75). The motion was heard January 30, 1950. On August 7, 1950, the court below entered the order from which this appeal was taken (R. 106). By that order (R. 106):

(1) Appellant, Bank of China, was finally denied access to its demand deposit in the hands of Wells Fargo;

(2) Wells Fargo was authorized to deposit with the Clerk of the District Court an amount equal to appellant's deposit with Wells Fargo;

(3) Wells Fargo was finally discharged from all liability to appellant;

(4) Wells Fargo was finally relieved of any obligation to pay interest to appellant;

(5) Appellant was enjoined from asserting any claim against Wells Fargo;

(6) The trial of the action was continued sine die;

(7) Appellant's motion for summary judgment was denied without prejudice;

(8) The motion of Messrs. Kenny, Popper, Dreyfus and McTernan for dismissal of the action or for substitution of attorneys was denied without prejudice.

Similar motions were made in case No. 12699 (R. No. 12699, p. 5) and a similar order entered (R. No. 12699, p. 26). Subsequently, Wells Fargo, pursuant to the order of the District Court, transferred to the Clerk of that Court an amount equal to the deposits (R. 393; R. No. 12699, p. 34).

Notices of appeal from the orders of the District Court were filed August 28, 1950 (R. 111; R. No. 12699, p. 31).

SPECIFICATION OF ERRORS RELIED UPON

A detailed statement of points upon which appellant relies in each case is in the record (R. 397; R. No. 12699, p. 35). They may be summarized as follows:

1. The court erred in failing to enter judgment for Bank of China against Wells Fargo in the amount of its deposits plus interest, in purporting finally to discharge Wells Fargo from all liability to Bank of China, including liability for interest, and in enjoining Bank of China from prosecuting its claims against Wells Fargo.

2. The court erred in failing to grant the motion of Bank of China for summary judgment and in failing to deny the motion of Messrs. Popper and Kenny with prejudice.

3. The court erred in authorizing a deposit of funds by Wells Fargo with the Clerk of Court and in postponing a determination of the disposition of those funds sine die.

SUMMARY OF THE ARGUMENT

Appellant, Bank of China, deposited its funds in San Francisco with Wells Fargo in accordance with a course of dealing extending over many years. The Bank, its officers and most of its directors, in advance of the Communist armies, moved from Shanghai to Canton to Chungking and finally to Formosa, where the Bank continues to operate. The Bank has demanded that Wells Fargo pay what is owing. Wells Fargo has refused to do so.

The Communist armies of China have conquered and subdued, to a greater or lesser degree, most of the mainland of China. The Communists appear to have seized many of the assets in China of the Bank of China and appear to have undertaken to operate those assets for banking purposes under the name of the Bank of China. Nothing, however, which has or can happen in China can affect the right of appellant to its San Francisco assets. It is settled beyond argument that a revolutionary regime, even though it may be a de facto government, which is unrecognized by this country cannot by any act of expropriation or seizure of a corporation or its assets obtain any claim to the assets of that corporation which are located in this country, including bank deposits. There is no dissenting view.

The Bank of China exists pursuant to a special charter of the National Government of China. Two-thirds of its stock is held by the Government of China. The Communists by claiming to be the "Government of China" acquire no claim to the bank stock. The "Government of China" to which the articles refer is by the terms of the articles themselves the National Government of China. That government became and remains the principal stock-

holder of the Bank. Moreover, the question of the identity of the government of China is a political question to be decided by the President on the advice of the Secretary of State. The President recognizes the National Government as the government of China. That decision is binding on this Court. The Communists cannot be heard here to assert claims based upon a contention that their government is the government of China.

The action of the District Court in sequestering funds of appellant at the behest of the Communists is contrary to the public policy of the United States and the policy of the Federal courts. The armies of Communist China have undertaken an armed conflict against the armies of the United Nations, including the armies of the United States. The policy of this Court is and must be to support the policy of the United States—not to withhold appellant's funds at the request of the Communists who have no standing in court and no claim to the funds.

Appellant is entitled to an order from this Court directing Wells Fargo to honor its obligation to appellant and to pay to appellant the principal amount of its deposits, plus interest from the date of demand.

ARGUMENT

A. Appellant Is Entitled to Judgment Against Wells Fargo for $798,584.64 Plus Interest.

Appellant Bank of China, specially chartered by the National Government of China and now conducting a banking business from Formosa, deposited its funds with appellee Wells Fargo (R. 4, 6; R. No. 12699, pp. 4, 15-16). The deposits were demand deposits (R. 4-6; No. 12699, pp. 4, 15-16). Demands were made for return of the funds.

These demands were not honored (R. 4-6; R. No. 12699, pp. 4, 15-16). The failure of Wells Fargo to honor the demands immediately vested a cause of action in appellant as depositor. *Allen v. Bank of America,* 58 Cal. App. 2d 124, 136 P.2d 345 (1943); *Union Tool Co. v. Farmers and M. Nat. Bank,* 192 Cal. 40, 53, 218 Pac. 424 (1923). A depositor is entitled to a judgment for the amount of his deposit plus interest from the date of demand until the date of judgment. "As an incident to the right to recover an unexpended balance in a deposit, a depositor is entitled to interest as damages for the failure to pay that balance upon demand." *Ticonic Bank v. Sprague,* 303 U.S. 406, 410, 58 S.Ct. 612, 614 (1938). "If the money is due on demand, interest is allowable from the time of demand." 14 Cal. Jur. 678; California Civil Code, Sec. 3302; *Ghirardelli v. Peninsula Properties Co.,* 16 Cal.2d 494, 499, 107 P.2d 41, 44 (1940); *Anderson v. Pacific Bank,* 112 Cal. 598, 603, 44 Pac. 1063, 1064 (1896); *Commercial Discount Co. v. Bank of America,* 61 C.A.2d 721, 726, 143 P.2d 484, 487 (1943); *Black v. Vermont Marble Co.,* 137 Cal. 683, 70 Pac. 776 (1902); cf. *Sokoloff v. National City Bank,* 250 N.Y. 69, 164 N.E. 745, 750 (1928). In the absence of a prior demand, interest begins to run upon institution of an action to recover the deposit. *Burks v. Weast,* 67 Cal. App. 745, 752, 228 Pac. 541, 544 (1924). The rate at which interest is to be allowed is the legal rate of 7 per cent per annum. 2 Deering's California General Laws 1350, Act 3757, Sec. 1; *Bank of the United States v. Foreman,* 102 Cal. App. 756, 766, 283 Pac. 874, 878 (1929). Appellant made demand on Wells Fargo for $600,000.00 on October 7, 1949 (R. 261), for $26,860.07 on November 9, 1949 (R. 4-5), and for the balance of $171,724.57 upon the institution of case No. 12699 on April

26, 1950 (R. 12699, pp. 4-5). Appellant is entitled to interest accordingly.

The fact that unfounded claims were asserted to the deposits does not justify Wells Fargo's refusal to pay or free it from its obligation to pay interest. *Lewine v. National City Bank,* 222 App. Div. 74, 225 N.Y.S. 309 (1927), aff'd. 162 N.E. 284 (1928), 164 N.E. 571 (1928); cf. *Commercial Discount Co. v. Bank of America,* 61 C.A.2d 721, 726, 143 P.2d 484, 487 (1943). The duty of the bank "is to pay the money to its depositor." *Wagner v. Worrell,* 76 C.A.2d 172, 180, 172 P.2d 751, 756 (1946). See also *Booth v. Oakland Bank of Savings,* 122 Cal. 19, 27, 54 Pac. 370, 372 (1898); *Ornbaun v. First Nat. Bank,* 215 Cal. 72, 78, 8 P.2d 470, 473 (1932). Wells Fargo had, in fact, no reason for uncertainty. The National Government of China is the recognized government of China and "The very purpose of the recognition by our Government is that our nationals may be conclusively advised with what government they may safely carry on business transactions and who its representatives are." *Guaranty Trust Co. v. United States,* 304 U.S. 126, 140, 58 S.Ct. 785, 792 (1938). Nor would a subsequent recognition of the Communists, even if it took place, in any way affect the validity of the prior payment to appellant. See *Guaranty Trust Co. v. United States,* 304 U.S. 126, 140, 58 S.Ct. 785, 792-3 (1938); *Banco de Espana v. Federal Reserve Bank,* 114 F.2d 438, 444 (C.C.A.2d 1940); *United States v. National City Bank of New York,* 90 F. Supp. 448, 453-455 (S.D. N.Y., 1950).[3]

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[3]Compare California Banking Code, sec. 952, which provides that a bank may disregard an adverse claim to a deposit unless that claim is supported by a court order. See in this connection *National City Bank v. Continental Nat. Bank,* 83 F.2d 134 (C.C.A. 10, 1936).

Appellant is entitled to judgment for its deposits with interest.

B. The Communists Have No Claim to the San Francisco Bank Deposits of Appellant.

Nothing which the Communists have done or can do in China has or will vest any claim in them or their representatives to the San Francisco bank deposits of appellant. This is true even if it be assumed that the Communists have de facto control of the China mainland, that they have established a de facto government there and that they have seized all the mainland assets of the Bank of China. It would be equally true even if, in addition, the Communists had purported to pass decrees nationalizing or expropriating the Bank of China, its corporate existence and all its assets wherever located. There are at least three reasons.

1. THE BANK OF CHINA, THE OWNER OF THE WELLS FARGO DEPOSITS, IS IN FULL OPERATION AND ENTITLED TO THE RETURN OF ITS FUNDS.

Appellant, the organization which was specially chartered by the National Government (R. 303) and which owns the funds on deposit with Wells Fargo, is still in full operation. In advance of the Communist armies and at the behest of the government (R. 194-5) which owns two-thirds of its stock (R. 90, 287-8) and under whose law it exists, the Bank, its officers and directors, left the mainland of China to establish headquarters in Formosa (R. 194-5, 298). From this site appellant continues its banking operation (R. 298, 282-3). The fact that the Communists may have seized the bank buildings, bank equipment and the physical assets of the Bank on the mainland of China can hardly mean that appellant has lost its rights to its San Francisco assets as well. The Bank which deposited funds

with Wells Fargo is the Bank which now claims them. That Bank has lost some of its assets by force of arms as it might lose some of its assets by fire or flood. Nothing else has happened. The Bank continues to operate under the authority of the government responsible for its existence. That government has held and continues to hold two-thirds of the bank stock. The Bank is a vigorous existing institution with full right to the return of the moneys it left with Wells Fargo.

2. AN UNRECOGNIZED FOREIGN GOVERNMENT CANNOT ACQUIRE A CLAIM TO ASSETS IN THE UNITED STATES.

Even if appellant were not actively in business, even if the Communists held not only all the Chinese assets of the Bank but, in addition, had by decree or otherwise, purported to seize the corporation itself and all of its assets wherever located, appellant would still be entitled to its San Francisco bank account. It is settled that an unrecognized foreign government cannot acquire directly or indirectly, in its own name or in the name of others, an interest in or claim to assets in the United States. There is no contrary view.[4]

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[4]The District Court suggested that the "decisions present a confusing picture" (R. 101). There is no confusion in the decisions, however, as far as the precise situation before the Court is concerned. The confusion, if any exists, arises in connection with other questions such as: (1) The effect to be given by United States courts to transactions involving persons or property physically subject to the de facto control of the unrecognized government and later appearing in this country. See *Texas v. White,* 7 Wall. (74 U.S.) 700, 733, 19 L.Ed. 227, 240 (1868); *Baldy v. Hunter,* 171 U.S. 388, 396, 18 S.Ct. 890, 892 (1898); *Banque de France v. Equitable Trust Co.,* 33 F.2d 202 (S.D. N.Y. 1929); *M. Salimoff & Co. v. Standard Oil Co.,* 262 N.Y. 220, 186 N.E. 679 (1933); *Oetjen v. Central Leather Co.,* 246 U.S. 297, 38 S.Ct. 309 (1918); *Underhill v. Hernandez,* 168 U.S. 250, 18 S.Ct. 83 (1897). (2) The effect of non-recognition upon claims asserted against the United

The Communist conquest of Russia settled the law. The Russian Communists like the Chinese Communists, seized the local assets of Russian corporations and, like the Chinese Communists, claimed assets located in the United States as well. Those claims were denied. The leading case is *Petrogradsky Mejdunarodny Kommerchesky Bank v. National City Bank of New York*, 253 N.Y. 23, 170 N.E. 479 (1930), cert. den. 282 U.S. 878. There plaintiff, a Russian bank chartered by the Imperial Government, had deposit accounts with the National City Bank in New York. In 1917 the Communists seized the Russian assets of plaintiff, drove its directors into exile in Paris, purported to confiscate all assets of plaintiff wherever located and, later, to abolish the plaintiff bank entirely. Thereafter the Russian directors in Paris undertook to collect the assets of plaintiff located there, in London and in New York. The National City Bank refused to honor the demands of the Paris directors on the ground, among others, that the Communists had not only seized the bank and its assets but had, indeed, terminated its existence. The New York Court of Appeals, noting that the acts of the Communists had no legal effect, directed judgment for plaintiff. Chief Judge Cardozo said:

> "The case comes down to this: A fund is in this state with title vested in the plaintiff at the time of the

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States. See *Russian Volunteer Fleet v. U. S.*, 282 U.S. 481, 51 S.Ct. 229 (1931). (3) The sovereign immunity, if any, of the unrecognized government. See *Wulfsohn v. Russian Soc. Fed. Sov. Republic*, 234 N.Y. 372, 138 N.E. 24 (1923), writ of error dismissed, 266 U.S. 580, 45 S.Ct. 89 (1924). But on the question before this Court—can the unrecognized government of China, directly or indirectly, in its own name or in the name of others, acquire a claim to appellant's San Francisco assets—there is no doubt or uncertainty whatever. The answer is no.

deposit. Nothing to divest that title has ever happened here or elsewhere. The directors who made the deposit in the name of the corporation or continued it in that name now ask to get it back. Either it must be paid to the depositor, acting by them, or it must be kept here indefinitely. Either they must control the custody, or for the present and the indefinite future it is not controllable by any one. The defendant expresses the fear that the money may be misapplied if the custody is changed. The fear has its basis in nothing more than mere suspicion. The directors, men of honor presumably, will be charged with the duties of trustees, and will be subject to prosecution, civil or criminal, if those duties are ignored. The defendant is not required to follow the money into their hands and see how they apply it. Its duty is to pay." p. 486.

The *Petrogradsky* decision has been accepted without hesitation or dissent. See, for example, *Vladikavkazsky Ry. Co. v. New York Trust Co.,* 263 N.Y. 369, 189 N.E. 456 (1934) and *M. Salimoff & Co. v. Standard Oil Co.,* 262 N.Y. 220, 186 N.E. 679 (1933), where the court said:

"We have considered the extraterritorial effect of Soviet decrees which liquidated Russian banks (Petrogradsky Mejdunarodny Kommerchesky Bank v. National City Bank, 253 N.Y. 23, 170 N.E. 479) and insurance companies (First Russian Ins. Co. v. Beha, 240 N.Y. 601, 148 N.E. 722). *We have reached the conclusion* in those and similar cases that such decrees had no extraterritorial effect and *that the continued existence of such companies, wherever they were found to function outside of Russia, would be recognized.*" p. 681. (Emphasis supplied)

The rule denying an unrecognized government power over assets in this country has been followed in the cases arising out of the German conquest of Europe during World War II. In *Koninklijke Lederfabriek "O" v. Chase Nat. Bank,* 177 Misc. 186, 30 N.Y.S.2d 518 (1941) aff'd 32 N.Y.S. 2d 131, the plaintiff corporation had money on deposit in New York with the Chase National Bank. The corporation and some of its officers made their way out of the Netherlands ahead of the Germans. In exile they brought suit for the deposit. The Germans, in the meantime, had taken charge of the Dutch assets of the corporation, declared that the old officers were no longer authorized to represent it and claimed the New York deposit. Judgment went for plaintiff. *Amestelbank, N. V. v. Guaranty Trust Co.,* 177 Misc. 538, 31 N.Y.S.2d 194 (1941), reached the same conclusion on substantially identical facts. More recently in *A/S Merilaid & Co. v. Chase Nat. Bank of City of New York,* 189 Misc. 285, 71 N.Y.S.2d 377 (1947), the defendant bank held a deposit of a corporation organized under the laws of the Republic of Estonia. The corporation, just prior to the incorporation of Estonia into the Soviet Union in 1940, transferred its activities to Sweden and thereafter sought to collect its New York bank account. The corporation, in the meantime, had been nationalized by the Estonian Soviet Socialist Republic, and its Estonian assets seized. It was held that a defense based upon the activities of the Soviet Government was invalid.[5]

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[5]For additional New York decisions generally to the same effect see *Fred S. James & Co. v. Rossia Insurance Co.,* 247 N.Y. 262, 160 N.E. 364 (1928); *Sokoloff v. National City Bank,* 239 N.Y. 158, 145 N.E. 917 (1924).

The early New York decision in *Russian Reinsurance Co. v. Stoddard,* 240 N.Y. 149, 147 N.E. 703 (1925), reargument denied, 148

The Federal courts have reached an identical conclusion. The leading case is *The Maret,* 145 F.2d 431 (C.C.A. 3, 1944). It too arose out of the 1940 Communist seizure of Estonia. The Soviet Government promulgated decrees purporting to nationalize privately-owned ships of Estonian registry and to place them under control of the Estonian State Steamship Line. *The Maret,* which belonged to an Estonian partnership, was in the Virgin Islands at the time of the Soviet action. It was held that the decrees of the unrecognized Estonian government could not affect ownership of the vessel physically beyond the jurisdiction of the de facto government. The court said:

> "When the fact of nonrecognition of a foreign sovereign and nonrecognition of its decrees by our Executive is demonstrated as in the case at bar, the courts of this country may not examine the effect of decrees of the unrecognized foreign sovereign and determine rights in property, subject to the jurisdiction of the examining court, upon the basis of those decrees. A policy of nonrecognition when demonstrated by the Executive must be deemed to be as affirmative and positive in effect as a policy of recognition." p. 442.[6]

N.E. 757, is not to the contrary. There the New York court refused as a matter of policy to take jurisdiction of a case brought by a Russian insurance company against the New York Superintendent of Insurance to recover deposits required by New York law to protect New York citizens. The case has no application here and in any event it was prior to and superseded by the *Petrogradsky Bank* case.

[6]Compare *The Denny,* 127 F.2d 404 (C.C.A. 3, 1942), an earlier decision by the same court. There the contest was as to the validity of three powers of attorney issued to Charles Recht and relating to a boat and its supplies purchased in the United States by Baltic Lloyd and Lietukis, Lithuania associations. Two of Recht's powers of attorney ran from Baltic Lloyd and Lietukis, concededly the owners of the boat and its supplies. The third ran from the Lithuanian State Steamship Line, an organization created by the

A similar conclusion was reached by the Fifth Circuit in *The Florida,* 133 F.2d 719 (C.C.A. 5, 1943), cert. den. 319 U.S. 774, and more recently by the District Court of the District of Columbia in *Latvian State Cargo and Passenger SS Line v. Clark,* 80 F. Supp. 683 (D. D.C. 1948).

The settled doctrine of American law that an unrecognized foreign government cannot deprive the lawful owner of his American assets is responsive to two considerations. First, there is the policy of the law against recognition of mere acts of force. "The decrees of the Soviet Republic nationalizing the Russian banks are not law in the United States, nor recognized as law (citing cases). They are exhibitions of power. They are not pronouncements of authority." *Petrogradsky Mejdunarodny Kommerchesky Bank v. National City Bank of New York,* 253 N.Y. 23, 170 N.E. 479, 481 (1930). Second, the political conclusion of the President to withhold recognition to any revolutionary or de facto government must be given full and affirmative respect by the courts. The Supreme Court has emphasized the broad power of the President, acting on advice of the Secretary of State, to determine policy with respect to recognition or nonrecognition. In *United States v. Pink,* 315 U.S. 203, 229, 62 S.Ct. 552, 565 (1942), the court con-

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Russian Communists when they took charge of Lithuania. It was held that the powers of attorney from Baltic Lloyd and Lietukis were sufficiently authenticated as acts of those companies to be accepted in evidence but that the power of attorney from the state corporation was not proved.

When the Court of Appeals for the Third Circuit decided *The Maret* in 1945, it reviewed its 1942 decision in *The Denny* along with more recent Federal court decisions such as *United States v. Pink,* 315 U.S. 203, 62 S.Ct. 552 (1942), and announced the doctrine on which appellant relies. *The Denny* cannot be accepted, therefore, as authority for any conflicting view.

sidered the effect to be given to recognition of the Soviet Government of Russia and said:

> "The powers of the President in the conduct of foreign relations included the power, without consent of the Senate, to determine the public policy of the United States with respect to the Russian nationalization decrees. 'What government is to be regarded here as representative of a foreign sovereign state is a political rather than a judicial question, and is to be determined by the political department of the government.' Guaranty Trust Co. v. United States, supra, 304 U.S. page 137, 58 S.Ct. page 791, 82 L.Ed. 1224. That authority is not limited to a determination of the government to be recognized. It includes the power to determine the policy which is to govern the question of recognition. Objections to the underlying policy as well as objections to recognition are to be addressed to the political department and not to the courts."

The President has determined that in the United States the government of China is the National Government of China. That government and that government alone is entitled to speak for China in this country. This political conclusion cannot be re-examined by the courts. "We would usurp the executive function if we held that that decision was not final and conclusive in the courts." *United States v. Pink, supra.* Any other rule would produce chaos. "If this were not the rule, cases might often arise in which, on the most important questions of foreign jurisdiction, there would be an irreconcilable difference between the executive and judicial departments. By one of these departments, a foreign island or country might be considered as at peace with the United States; whilst the other would consider it

in a state of war. No well regulated government has ever sanctioned a principle so unwise, and so destructive of national character." *Williams v. The Suffolk Insurance Company,* 13 Pet. (38 U.S.) 415, 420, 10 L.Ed. 226, 228 (1839).

The consequence is that as far as the courts of the United States are concerned and as far as property within the United States is concerned there is no government of China other than the National Government. The acts of Chinese Communists are, for purposes of this country and its courts, mere assertions of power. They confer no rights to assets in this country; they do not affect title to those assets; they are not to be recognized as law.

3. THE COMMUNISTS HAVE NO CLAIM TO THE GOVERNMENT STOCK IN THE BANK OF CHINA.

Appellant was specially chartered by the National Government on October 28, 1928 (R. 303) and its status was revised by order of the Ministry of Finance of that government on March 28, 1935 (R. 303). It became the international exchange bank for the National Government (R. 164) and it assumed many governmental functions. It became responsible for issuing bonds of the National Government in foreign markets, for handling public funds of the National Government both abroad and at home and for the government policy of trade promotion (R. 305). The National Government made contributions to the capital of the Bank (R. 164, 287) and eventually became the owner of two-thirds of its stock (R. 90, 287-8). The Bank was and is an arm of the National Government, a government which continues to function, which continues to be the principal stockholder of the Bank (R. 287-8) and

which continues to receive recognition from the United States (R. 347-8).

The claim of the Communists to the stock of the Bank is based, by their own account, on nothing but force. "Following Shanghai liberation Shanghai Military Control Commission East China Command *took over* government stocks on behalf government * * * " (R. 93) and "H. H. Kung T. V. Soong being war criminals *their stocks have been confiscated*" (R. 92). (Emphasis supplied.) This brief demonstrates that such efforts at confiscation by an unrecognized government create no claim to assets in the United States.

Moreover, even if the Bank as an adjunct to the National Government could be held to exist independently of that government, even if its articles could be read to refer to a government other than the National Government, the question of the identity of the government of China is not open to debate in this Court. "What government is to be regarded here as representative of a foreign sovereign state is a political rather than a judicial question, and is to be determined by the political department of the government." *Guaranty Trust Co. v. United States,* 304 U.S. 126, 137, 58 S.Ct. 785, 791 (1938). In that case the Supreme Court held that a New York bank deposit of the Imperial Russian Government belonged during the period from 1917 to 1933 to the Kerensky regime, as the recognized Russian government, even though the Communists were actually in control of Russia and exercising de facto powers of government. As far as assets within the United States are concerned the recognized government of a foreign country is the government of that country for every purpose. This is the conclusion of the Supreme

Court in the *Guaranty Trust* case[7] and that conclusion forecloses any claim which the Communists might attempt to assert here on the theory that their government is the government of China. Stock belonging by definition to the government of China belongs, for this reason alone and leaving all other considerations aside, to the National Government.

Thus the Communists are left on every score with no claim to appellant's San Francisco bank accounts. This is, indeed, the least difficult of all the cases arising from Communist conquest. In the ordinary case of Communist claims to American assets of captured corporations the Communists have seized the local assets of the corporation, they have taken control of the persons of the stockholders of the corporation, they have decreed nationalization of the corporation and its stock and they have put an end to all corporate activity. Here, by comparison, the Communists have been unable to seize the principal stockholder of appellant, they have been unable to seize the principal officers of appellant, they have been unable to put an end to appellant's activities and they are unable to claim in this Court that they have become the government of China. Since the decisions make it clear that even in the ordinary case the Communists have no claim to assets located in the United States, the result properly to be reached here seems particularly clear.

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[7]For additional decisions to the same effect see *In re Grauds Estate*, 41 N.Y.S.2d 263 (Sur. Ct. 1943), 43 N.Y.S.2d 803 (Sur. Ct. 1943), 180 Misc. 558, 45 N.Y.S.2d 318 (Sur. Ct. 1943), 59 N.Y.S.2d 710 (Sur. Ct. 1945); *Lehigh Valley R. Co. v. State of Russia*, 21 F.2d 396 (C.C.A. 2, 1927), cert. den. 275 U.S. 571; *Agency of Canadian Car & F. Co. v. American Can Co.*, 258 Fed. 363 (C.C.A. 2, 1919); *United States v. National City Bank of N. Y.*, 90 F. Supp. 448 (S.D. N.Y. 1950).

C. The Communists Cannot Be Heard to Assert a Claim to Appellant's Deposits with Wells Fargo.

Even if the Communists had a claim to appellant's bank accounts, that claim could and would not be considered by this Court. There are two reasons.

First. It is settled that an unrecognized foreign government cannot appear in any Federal court. "It is not denied that, in conformity to generally accepted principles, the Soviet Government could not maintain a suit in our courts before its recognition by the political department of the Government. For this reason access to the federal and state courts was denied to the Soviet Government before recognition." *Guaranty Trust Co. v. United States,* 304 U.S. 126, 137, 58 S.Ct. 785, 791 (1937). This means that this Court will not hear any claim by or on behalf of the Chinese Communist Government even if it be assumed that the claim existed. Since the Communist claims before the Court have their origin with the "Shanghai Military Control Commission East China Command" (R. 93) or the "Central Peoples Government" (R. 94) or the "New Government" (R. 90), it is clear enough that even if they had validity they could not be heard. This perhaps explains the fact that the Communist representatives have not in this litigation actually made claim to the Wells Fargo deposits. Denied access to the courts to assert their claims directly they seek to give those same claims an indirect but equal effect by denying appellant the right to its deposits. The rule is not so easily evaded. Communists who cannot be heard to claim that the Wells Fargo deposits belong to them cannot be heard to claim that those deposits do not belong to appellant because they might belong to them. A claim that cannot be heard

to establish Communist ownership cannot, for the same reasons, be heard to defeat appellant's ownership.

Second. Even if the Communists were entitled to be heard in this Court in support of their claims and even if those claims had some validity, the Court as a matter of public policy would refuse to give them effect. Claims based upon foreign law or the activities of a foreign sovereign are enforced in the courts of the United States not as a matter of right but only as a matter of comity. "No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call 'the comity of nations.'" *Hilton v. Guyot,* 159 U.S. 113, 163, 16 S.Ct. 139, 143 (1895). See also *Second Russian Ins. Co. v. Miller,* 297 Fed. 404, 409 (C.C.A. 2, 1924), aff'd 268 U.S. 552; *Vladikavkazsky Ry. Co. v. New York Trust Co.,* 263 N.Y. 369, 189 N.E. 456, 460 (1934). That comity must and does yield to the public policy of the forum. "It [comity] is the voluntary act of the nation by which it is offered; and is inadmissible when contrary to its policy, or prejudicial to its interests." *Bank of Augusta v. Earle,* 13 Pet. 519, 589, 10 L.Ed. 274, 308 (1839); *Hilton v. Guyot,* 159 U.S. 113, 165, 16 S.Ct. 139, 144 (1895); *Second Russian Ins. Co. v. Miller,* 297 Fed. 404, 409 (C.C.A. 2, 1924), aff'd 268 U.S. 552; *Russian Socialist Federated Soviet Republic v. Cibrario,* 235 N.Y. 255, 139 N.E. 259, 260 (1923). The federal courts for obvious reasons will not as a matter of public policy recognize transactions and claims which will

give aid and comfort to the enemies of the United States. "The investment was, therefore, a direct contribution to the resources of the Confederate government; it was an act giving aid and comfort to the enemies of the United States; and the validity of any transaction of that kind, from whatever source originating, ought not to be a debatable matter in the courts of the United States." *Horn v. Lockhart,* 17 Wall. (84 U.S.) 570, 580, 21 L.Ed. 657, 660 (1873). "The proposition that there is in many cases a public policy which forbids courts of justice to allow any validity to contracts because of their tendency to affect injuriously the highest public interests, and to undermine or destroy the safeguards of the social fabric, is too well settled to admit of dispute." *Sprott v. United States,* 20 Wall. (87 U.S.) 459, 463, 22 L.Ed. 371, 372 (1874). See also *Texas v. White,* 7 Wall. (74 U.S.) 700, 733, 19 L.Ed. 227, 240 (1868); *Kennett v. Chambers,* 14 How. (55 U.S.) 38, 48, 14 L.Ed. 316, 321 (1852). The armies of Communist China have undertaken to engage in an armed conflict with the armies of the United States. Under these circumstances no federal court will attend to claims having their origin with the Chinese Communists.

D. Appellant Is Entitled to Judgment Without Further Proceedings.

These cases are before the Court on appeals from orders of the District Court purporting finally to discharge appellant's claims against appellee. The orders were entered after hearing upon motions for summary judgment and to dismiss the actions. There has been no trial, nor is there any occasion for one. The facts which control the disposition of these cases are not in dispute. Wells Fargo

admits that Bank of China made the deposits with it (R. 67, 114-17, 120, 122, 137, 144; R. 12699, p. 15) and admits the demands for the return of the funds (R. 6; R. 12699, p. 16). It is undisputed, too, that the deposits belong either to appellant or to the Communists and that in the absence of the Communists' claims the funds would have been returned to appellant (R. 116-17, 144, 150, 330-31). This brief demonstrates that neither the claims which the Communists have made nor any claims that they might assert have or can have any effect upon the right of appellant to its moneys. This is the rule of law. That rule, applied to the undisputed facts of this case, makes it plain that appellant is entitled to immediate judgment.[8] There is, therefore, nothing to try in these cases, and similar cases are regularly decided on the pleadings, affidavits, depositions and motions. See *United States v. Pink,* 315 U.S. 203, 62 S.Ct. 552 (1942); *Guaranty Trust Co. v. United States,* 304 U.S. 126, 130, 58 S.Ct. 785 (1938), 100 F.2d 369 (C.C.A. 2, 1938), *Banco de Espana v. Federal Reserve Bank of New York,* 114 F.2d 438 (C.C.A. 2, 1940); *Latvian State Cargo & Passenger S.S. Line v. Clark,* 80 F.Supp. 683 (D. D.C., 1948); *Vladikavkazsky Ry. Co. v.*

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[8]Appellant, entitled to immediate judgment should not have been subjected to indefinite postponement. Compare Marshall, C. J., in *Cohens v. Virginia,* 6 Wheat. 264, 404, 19 L.Ed. 257, 291 (1821). "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. * * * Questions may occur which we would gladly avoid but we cannot avoid them. All we can do is to exercise our best judgment and conscientiously to perform our duty." See also *Southern Calif. Tel. Co. v. Hopkins,* 13 F.2d 814, 820 (C.C.A. 9, 1926) aff'd 275 U.S. 393. "Decision that there was power to hear and determine removed any question of discretion and left a bounden duty to proceed to a decree." and *Mutual Life Ins. Co. v. Krejci,* 123 F.2d 594 (C.C.A. 7, 1941); *Aetna Casualty & Surety Co. v. Quarles,* 92 F.2d 321 (C.C.A. 4, 1937).

New York Trust Co., 263 N.Y. 369, 189 N.E. 456 (1934); *M. Salimoff & Co. v. Standard Oil Co.*, 262 N.Y. 220, 186 N.E. 679 (1933); *Russian Socialist Federated Soviet Republic v. Cibrario*, 235 N.Y. 255, 139 N.E. 259 (1923).

There is no basis upon which the disposition of these cases by the District Court can be supported. What the court did was to dismiss the defendant and absolve it from all liability, order the money paid into court, deny the petition of the Communists—thus leaving only one party, the plaintiff, in the case—and then hold that this sole remaining party was not entitled to judgment. Such a startling conclusion was without precedent.[9]

Where, as here, the undisputed facts entitle a litigant to judgment, the appellate court may appropriately enter or direct the entry of judgment accordingly. See *City and County of Denver v. Denver Union Water Co.*, 246 U.S. 178, 38 S.Ct. 278 (1918); *North Carolina R. Co. v. Story*, 268 U.S. 288, 45 S.Ct. 531 (1925); *Mass. Bonding & Ins. Co. v. Santee*, 62 F.2d 724, 728 (C.C.A. 9, 1933); *Jensma v. Sun Life Assur. Co.*, 64 F.2d 457 (C.C.A. 9, 1933), cert. den. 289 U.S. 763; *Lydon v. New York Life Ins. Co.*, 89 F.2d 78, 83 (C.C.A. 8, 1937), cert. den. 302 U.S. 703; *Potter v. Beal*, 50 Fed. 860, 864 (C.C.A. 1, 1892).

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[9]In *United States v. Pink*, 315 U.S. 203, 237, 62 S.Ct. 552, 568-9 (1942) Mr. Justice Frankfurter, concurring, said: "But adjournment, it may be suggested, is sometimes a constructive interim solution to avoid a temporizing and premature measure. . . ." It should be noted, however, that this suggestion was not adopted by the Supreme Court; that the New York Court of Appeals expressly repudiated a similar suggestion, as Mr. Justice Frankfurter notes; and it was in any event only a suggestion as to what a statutory liquidator might do. Justice Frankfurter did not in any way intimate that the Federal courts should become depositories of all the foreign funds in the United States.

CONCLUSION

It is respectfully submitted that appellant, Bank of China, should receive judgment in case No. 12698 for $626,860.07, with interest at 7 per cent per annum on $600,000.00 thereof from October 7, 1949, and on $26,860.07 thereof from November 9, 1949, and costs of suit; and in case No. 12699 for $171,724.57 plus interest thereon at 7 per cent per annum from April 26, 1950, and costs of suit.

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